Supreme Court, U.S.
FILED
SEP 28 1979
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

No. 79-5438

LEON GAYLE,
a/k/a LEON WAITERS,

Petitioner,

vs.

THE PEOPLE OF THE STATE
OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

STEVEN T. WAX
Attorney for Petitioner
Broome County Public Defender
Old County Office Building
Binghamton, New York 13901
(607) 772-2403

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IN THE SUPREME COURT

OF

THE UNITED STATES OF AMERICA

- - - - - - - - - - - - - - - - - - -

LEON GAYLE
a/k/a LEON WAITERS,

Petitioner,

vs.

THE PEOPLE OF THE STATE
OF NEW YORK,

Respondent.

- - - - - - - - - - - - - - - - - - -

PETITION FOR A WRIT OF CERTIORARI
TO NEW YORK STATE SUPREME COURT,
APPELLATE DIVISION, THIRD DEPARTMENT.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Leon Gayle, the petitioner herein, prays that a Writ of Certiorari issue to review the order of the New York State Supreme Court, Appellate Division, Third Department entered in the above-entitled case on May 15, 1979 which affirmed a judgment of conviction of the County Court of

Broome County, New York dated April 21, 1978.

I.

The opinion of the Supreme Court of the State of New York, Appellate Division, Third Department, which has not yet been officially reported, is printed in Appendix A hereto, infra, page A-3. The unofficial citation is 416 N.Y.S.2d 158. The sentencing minutes of the County Court of Broome County are printed in Appendix A hereto, infra, page A-6.

II.

A. The order of the Supreme Court of the State of New York, Appellate Division, Third Department (Appendix A, infra, page A-2) was entered on May 15, 1979. Leave to appeal to the Court of Appeals of the State of New York was denied on June 24, 1979 (Appendix, A, infra, page A-4).

B. This petition for a Writ of Cer-

tiorari is timely filed within ninety days from the date of entry of the Certificate Denying Leave to Appeal to the Court of Appeals of the State of New York.

C. The statutory provisions for the Court to review the order in question by Writ of Certiorari are:

1. Rule 19 of the Rules of the Supreme Court of the United States.

2. 28 United States Code, Section 1257(3).

III.

The questions for review are:

A. Whether, without infringement of constitutional rights, an arrest may be made within a rented motel room occupied by the defendant, where probable cause would appear to exist but there are no exigent circumstances and no warrant of arrest has been issued.

B. Whether all items of physical

evidence and statements were the product or "fruit" of an illegal arrest.

IV.

The Constitutional provisions and statutes of the State of New York to be reviewed are:

A. The Fourth Amendment to the Constitution of the United States of America which states:

> The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

B. Section 140.15 of the Criminal Procedure Law of the State of New York entitled "Arrest Without a Warrant: when and how made by a police officer", which states:

> 1. A police officer may arrest a person for an offense, pursuant

> to Section 140.10, at any hour of any day or night.
>
> 2. The arresting police officer must inform such person of his authority and purpose and of the reason for such arrest unless he encounters physical resistance, flight or other factors rendering such procedure impractical.
>
> 3. In order to effect such an arrest, such police officer may use such physical force as is justifiable pursuant to Section 35.30 of the Penal Law.
>
> 4. In order to effect such an arrest, a police officer may enter premises in which he reasonably believes such person to be present, under the same circumstances and in the same manner as would be authorized, by the provisions of subdivisions four and five of Section 120.80, if he were attempting to make such arrest pursuant to a warrant of arrest.

V.

STATEMENT OF CASE

On September 13, 1977, an armed robbery took place at Crone's Drugs in Binghamton, New York. Two black males described as well-dressed, good appear-

ance, thin built, were involved in the robbery (A-14, A-15). A police patrol working the area of the robbery earlier in the day had observed a vehicle believed to be a green Ford with temporary Pennsylvania plates. The vehicle was occupied by two black males. Headquarters suggested stopping and questioning the occupants if the vehicle was located (A-15). Officer David Martin, in possession of the above information, located a witness who saw two black males flee the area of Crone's Drugs in a bluish-green car that was not a Ford, but was bigger, like a Chrysler or a Pontiac (A-17, A-18).

Officer Martin went back to his post but began checking motels and parking lots on the East Side of Binghamton. A few hours after the robbery and some four miles from the scene, Martin

spotted a bluish-green Chrysler with temporary Pennsylvania plates in the parking lot of the Holiday Inn East (A-17, A-18). Officer Martin learned that no occupant of the motel was listed as owning the Chrysler. However, two black males had arrived a couple of hours earlier, claiming to be driving a Volkswagen although there was no Volkswagen in the lot (A-18, A-19). Martin called headquarters, and more police officers responded to the Holiday Inn (A-20). At least five police officers ultimately arrived (A-28).

After the remaining police officers arrived, Captain Pasquale Francescone, the officer in charge made a decision to knock and enter the room (A-37). Francescone knocked, upon request identified himself and waited as asked by a voice from within the motel

room. Francescone then heard two voices and shortly a black male came out (A-37, A-38). Captain Francescone decided the man matched the general description of one of the suspects and placed the man under arrest (A-39). Francescone then decided to enter the motel room to find the second suspect. No attempt was made to first obtain a warrant, despite the fact that the area was secure because of the presence of numerous police officers surrounding the room. He obtained a pass key from the manager and, along with Officer Martin and another police officer entered the room after using the pass key to open the door (A-39). The petitioner, Leon Gayle, was found in the room and arrested (A-40).

During the intrusion into the room, the police observed a hypodermic needle (A-46), items of clothing matching those

worn by the robbery suspects and prescription bottles reported stolen during the robbery (A-31, A-32). Captain Francescone then called headquarters and requested a search warrant (A-40, A-41). Subsequently, the police searched the motel room and the car (A-48). The weapon used in the robbery and items taken during the robbery were seized pursuant to the search. Mr. Gayle was then questioned at police headquarters and eventually gave a complete confession (A-54).

At a suppression hearing held in Broome County Court, counsel for the defense argued that the entry into the motel room with the pass key was illegal, the arrest of Mr. Gayle was improper and all post-entry evidence should have been suppressed (A-59). The Court disagreed, found the apprehension of Gayle lawful and denied the motion to suppress (A-60). The New York State Supreme Court, Ap-

pellate Division, Third Department affirmed without opinion (A-3).

VI.

The petition for the Writ of Certiorari, applied for herein, should be granted for the following reasons:

A. The Fourth Amendment of the Constitution of the United States of America guarantees the right of the people to be free from unreasonable searches and seizures of their houses. This right has been deemed to apply to apartments and rooms in a hotel [Stoner v. California, 376 U.S. 483 (1964)]. The Fourth Amendment makes it clear that warrantless searches and seizures are not to be tolerated except under the most unusual circumstances. It is respectfully suggested that Section 140.15 of the Criminal Procedure Law of the State of New York violates the standards imposed by the Fourth Amendment in that Section

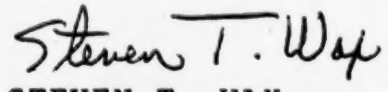
140.15 authorizes a police officer, without limitation, to enter any premise for purposes of effecting an arrest without a warrant. It is further suggested that no exigent circumstances existed in the instant matter which would excuse the warrantless entry of the motel room, the arrest of Leon Gayle and the concomitant infringement of his constitutional rights under the Fourth Amendment.

B. The items of physical evidence observed in the motel room concurrent with the arrest of Mr. Gayle, the items of physical evidence seized from the Chrysler and the motel room pursuant to the search warrant and the confession of Mr. Gayle all were the "fruit" or product of the initial illegal warrantless entry into the motel room and should have been suppressed. No factors are present which would purge the taint of the initial illegal entry.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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APPENDIX

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STATE OF NEW YORK
COUNTY COURT : BROOME COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

against

NOTICE OF APPEAL

LEON GAYLE
a/k/a LEON WAITERS

SIRS:

PLEASE TAKE NOTICE, that the defendant hereby appeals to the Appellate Division of the Supreme Court, Third Department, from the judgment of conviction rendered against him in this Court on the 21st day of April, 1978, convicting him of the crime of Robbery in the First Degree, and from each and every part thereof and from each and every intermediate order therein made.

Dated: Binghamton, New York
April 24, 1978

Yours, etc.,

PETER L. YELLIN
Broome County Public Defender
Attorney for Defendant
Old County Office Building
Binghamton, New York

TO: HON. PATRICK D. MONSERRATE
Broome County District Attorney
Old County Office Building
Binghamton, New York

WILLIAM E. D. BARLOW(2 copies)
Broome County Clerk
County Office Building
Binghamton, New York

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 19th day of March, 1979.

PRESENT:
HON. A. Franklin Mahoney, Presiding Justice

HON. Louis M. Greenblott
HON. Michael E. Sweeney
HON. Ellis J. Staley, Jr.
HON. Ann T. Mikoll
Associate Justices.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

-vs-

LEON GAYLE, aka LEON WAITERS, Appellant.

County Clerk's Index No. 77-321

Leon Gayle, aka Leon Waiters, having appealed from a judgment of conviction of the County Court of Broome County, rendered on the 21st day of April, 1978, and said appeal having been presented during the above-stated term of this Court, and having been argued by Peter L. Yellin, Esq., Broome County Public Defender, of counsel for appellant, and by Scott Bowen, Assistant District Attorney, of counsel for respondent, and, after due deliberation, the Court having rendered a decision on the 3rd day of May, 1979, it is hereby

ORDERED that the judgment be and hereby is affirmed and matter remitted to the county court.

ENTER:

/s/ John J. O'Brien
Clerk

DATED AND ENTERED: May 15, 1979.
A TRUE COPY:
John J. O'Brien
Clerk

RECEIVED
MAY 21 1979
BROOME COUNTY
PUBLIC DEFENDER

May 3, 1979

33572

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,
v.
LEON GAYLE, Also Known as LEON WAITERS,
Appellant.

Appeal from a judgment of the County Court of Broome County (Smyk, J.), rendered April 21, 1978, upon a verdict convicting the defendant of two counts of the crime of robbery in the first degree.

Judgment affirmed. No opinion.

MAHONEY, P.J., GREENBLOTT, SWEENEY, STALEY, JR., and MIKOLL, JJ., concur.

State of New York
Court of Appeals

BEFORE: HON. HUGH R. JONES, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK
Respondent,

against

Leon Gayle a/k/a Leon Waiters,
Appellant.

CERTIFICATE
DENYING
LEAVE

I, HUGH R. JONES, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Utica, New York
June 27, 19 79

Associate Judge

*Description of order: Order of Appellate Division, Third Department, dated March 19, 1979, affirming judgment of County Court, Broome County, rendered April 21, 1978 [conviction of robbery 1st degree].

STATE OF NEW YORK

COUNTY COURT : COUNTY OF BROOME

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff

-vs- Indictment No. 77-321

LEON GAYLE, also known as Leon Waiters,

Defendant

APPEARANCES:

PATRICK D. MONSERRATE, ESQ., Broome County District Attorney, Attorney for Plaintiff, County Office Building, Binghamton, New York.

PETER L. YELLIN, ESQ., Broome County Public Defender, (John T. Hillis, Esq., Chief Assistant District Attorney of Counsel), Attorney for Defendant (Assigned), County Office Building, Binghamton, New York.

LEON GAYLE, also known as Leon Waiters, Defendant.

Proceedings had in the above entitled action held at a TERM of County Court held in the Court House, Binghamton, New York, on Friday, April 21, 1978, before Hon. Stephen Smyk, Judge.

Thelma R. Davis
Official Reporter

(Friday, April 21, 1973, Binghamton, New York.)

The Clerk: The People of the State of New York against Leon Gayle, also known as Leon Waiters, if you'll step before the bench, please.

The Court: Your name is actually Leon Waiters, although you're also known as Leon Gayle, is that correct?

Defendant: Yes, that's correct.

The Court: All right, you're before the Court for sentencing following your conviction by -- on the return of a verdict of guilty by a Grand Jury -- by a trial jury, excuse me, of this county.

At this point, Mr. Waiters, the District Attorney of Broome County has filed a statement indicating that you have a predicate felony conviction in your record, and this filing pursuant to subdivision one of section 400.21 of the Criminal Procedure Law of the State of New York states and alleges you have been subjected to a predicate felony conviction on or about -- having been had on or about November fifth, nineteen sixty-nine when you were convicted in the Court of Record in and for Manatee County, Florida, County of Manatee, State of Florida, for the felony grade of robbery of Florida section 813.01 - 1, and you were duly sentenced therefor at that time.

Now, at the present time our law

provides for additional mandatory imprisonment for a second felony offender if the prior felony occurred within the past ten years and which felony would require this Court to sentence you as a second felony offender.

It appears that your prior felony conviction, having been had on November fifth, nineteen sixty-nine, would now subject you to a mandatory second felony offender sentence.

Have you discussed this matter with your attorney?

Defendant: Yes, sir, I have.

The Court: All right. Now, do you admit or deny you are the same person who was so convicted in Manatee County, Florida for the crime of robbery?

Defendant: Yes, I am the same person.

The Court: You are the same person. Now, do you challenge in any manner the constitutionality of the prior felony conviction?

(No audible response from the defendant.)

The Court: Mr. Millis?

Mr. Millis: No, Your Honor.

The Court: All right, Mr. Waiters.

Mr. Monserrate, do you wish to be heard on behalf of the People?

Mr. Monserrate: No, Your Honor.

The Court: Is there anything you wish to say, Mr. Hillis, before I turn to the defendant?

Mr. Hillis: No, Your Honor.

The Court: Mr. Waiters, is there anything you would like to say to the Court before I pass sentence? Is there anything you want to state on your behalf I may not be aware of from the lengthy presentence report which I have and from talking with your attorney on several occasions?

Defendant: No, sir. There is not really much I can say other than to say I'm sorry, and I am sorry. I realize it's not going to be much help now. I'm sorry it occurred. I'm sorry I even got involved with it, but I guess that doesn't matter now.

The Court: I'm taking into account the facts of this particular crime as they were developed at the trial held in this Court room; I am also taking into account the lengthy record that you have in your background, criminal record which goes back as far as the year nineteen sixty.

It's the sentence of the Court, you are hereby sentenced to a term of -- an indeterminate term of imprisonment for a period of not more than twenty years nor less than ten years. This sentence is to run consecutively, not concurrently, to any unexpired sentence there is pending at the present time. I am going to order you committed to the

custody of the New York State Department of Correctional Services, and I direct that you be delivered to the Attica Correctional Facility.

Under the law, Mr. Waiters, you have an absolute right to appeal the sentence which I have just pronounced, in fact, your conviction here in this Court. To do so, a Notice of Appeal has to be filed within thirty days from today's date. Mr. Hillis or someone in his office will be glad to file such a Notice of Appeal in your behalf, and the Appellate Division will assign an attorney to represent you without any charge or cost to you. Do you understand this?

Defendant: Yes, I do.

Mr. Monserrate: Your Honor, the defendant was convicted under two counts. Would that be a concurrent sentence?

The Court: I'm sorry. It's the same sentence, concurrently as far as the conviction under counts one and two here are concerned, which will be consecutive to any other unexpired term he may owe.

STATE OF NEW YORK

COUNTY COURT : COUNTY OF BROOME

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff

-vs- Indictment No. 77-321

LEON GAYLE, also known as Leon Waiters,

Defendant

APPEARANCES:

PATRICK D. MONSERRATE, ESQ., Broome County District Attorney, (and Robert Rose, Esq., Assistant District Attorney of Counsel,) Attorney for Plaintiff, County Office Building, Binghamton, New York.

PETER L. YELLEN, ESQ., Broome County Public Defender, (John T. Hillis, Esq., Chief Assistant Public Defender of Counsel), Attorney for Defendant (Assigned), County Office Building, Binghamton, New York.

LEON GAYLE, also known as Leon Waiters, Defendant.

Proceedings had in the above entitled action held at TERMS of County Court held in the Court House, Binghamton, New York, on Tuesday, February 14, 1978, commencing on Tuesday, February 21, 1978, and on Friday, April 21, 1978, before Hon. Stephen Smyk, Judge.

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STATE OF NEW YORK

COUNTY COURT : COUNTY OF BROOME

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff

-vs- Indictment No. 77-321

LEON GAYLE, also known as Leon Waiters,

Defendant

APPEARANCES:

PATRICK D. MONSERRATE, ESQ., Broome County District Attorney, (Robert Rose, Esq., Assistant District Attorney of Counsel), Attorney for Plaintiff, County Office Building, Binghamton, New York.

PETER L. YELLIN, ESQ., Broome County Public Defender, (John T. Hillis, Esq., Chief Assistant Public Defender of Counsel), Attorney for Defendant (Assigned), County Office Building, Binghamton, New York.

LEON GAYLE, also known as Leon Waiters, Defendant.

Proceedings had in the above entitled action held at a TERM of County Court held in the Court House, Binghamton, New York, on Tuesday, February 14, 1978, before Hon. Stephen Smyk, Judge.

(Tuesday, February 14, 1978, Binghamton, New York.)

Mr. Rose: The defense has made an informal motion, or an oral motion for a hearing to suppress evidence obtained under the search warrant, as well as a hearing to suppress the statement, and as our first witness in respect to that we call Patrolman David Martin of the Binghamton Police Department.

Mr. Hillis: Your Honor, I might add that my motion is also addressed to certain items of physical evidence which were obtained through taking custody of the defendant; it's an omnibus motion directed at everything that was obtained.

The Court: All right.

DAVID MARTIN, being first duly sworn on behalf of the People, testified as follows:

Direct examination by Mr. Rose:

Q. Officer, for the record, you are a patrolman with the City of Binghamton Police Department?

A. Yes, sir.

Q. And how long have you been so employed?

A. Seven years.

Q. And were you on duty on the thirtieth of September of last year, a Friday?

A. Yes, I was.

Q. Did you have occasion to become involved in an investigation of a robbery reported to have taken place at Crone's Drugs

on Conklin Avenue and The Arena on that date?

A. Yes, I did.

Q. Could you tell the Court what your first actions were upon becoming involved in the investigation?

A. I had just come to work. I was in a marked police car, and I was dispatched to that location as the initial car -- the third car in. The suspect had left the area, so I immediately started canvassing the immediate area, which was Conklin Ave and The Arena.

Q. Did you have a description of the suspects?

A. After we had arrived it was put over the air that -- Well, the people inside Crone's stated it was two black males that were involved, and that was put over the air and, in response to that, again a radio transmission come back saying the police officer working that area during that trick, which was seven to three P.M., stated he had observed two black males in what he believed was a green Ford, but it had temporary Pa. plates, which possibly could be a car to stop and question with regard to this robbery. With that information, I started going around house to house and asked if anyone had seen anything.

Q. Did you have anything more specific at that time as far as the appearance of the two black males?

A. Basically, all I knew at that time was they were well-dressed, good appearance, thin built, and that was basically it

Q. What did you do then at that point on your own investigation?

A. Like I said, I starting going house to house asking if they had seen anything. I immediately started with people that were outside, and the second house in from Conklin Ave, which was four The Arena, there was a man standing there. He was approximately nineteen years old, and I asked him if he had seen anything. He stated, well, before all the police cars started arriving his girl friend and her mother had just left his house, and as they were pulling out of The Arena onto Conklin Ave a car came out of the parking lot of Crone's and they were forced to stop to let the car through. The car continued on to Conklin Avenue. I asked what the description was. He was very vague about the car, but he stated a black male was driving the car. So I obtained the address and names of the mother and his girl friend. I checked a couple more houses, and received no other information than that.

Q. Did you talk to the mother and the girl friend?

A. Okay. When more detectives arrived at the scene, I was told to leave the area, or to start checking the area other than the immediate Conklin and The Arena, so I decided to go over to where the girl friend and the mother lived, and I went over there and talked to them. I told them what the incident was and if something happened to

them. They stated yes, they were pulling out of The Arena and a car come out of the parking lot at Crone's and they had to stop for it. The car shot right out onto Conklin Road, downtown, and heading west on Conklin.

Q. Did they indicate about what time that happened?

A. Well, no, they didn't give me a specific time.

Q. Did they give you a time-frame at that time?

A. Well, I said, "Had you just come home from The Arena and Conklin Avenue, you know, from Mr. Williams' house?" They stated, yes, they arrived half an hour ago, which was approximately forty-five minutes from the time I initially received the first call to respond to that area.

Q. So it would be just in the same time-frame as the robbery itself?

A. Yes, it would.

Q. What were they able to tell you about that automobile?

A. I asked them did they see the people in the car. They both responded it was two black males. I asked them if they were well-dressed; they said, "Yes, they were." I said, "Could you give me a general description of them?" The only description I got was they were well-dressed black males, thin facial features was all I got. I asked them if it could possibly have been a green Ford. The mother said, "No, it wasn't a green Ford." The daughter stated; "It looked more

bluish-green." I said, "Could it have been a Ford?" The mother responded, "No, it was a bigger car." I asked what she meant by a bigger car. She said, "It was a Chrysler, a Plymouth, or a Pontiac, that type of thing." I said, "Okay." I asked her if she had seen the plate, and she said, "No," at that time; she hadn't seen the plate. So I wrote this information down, the information I received from Mr. Williams who lived at four The Arena, and the information I had received from the mother and the daughter, the Renos, and took that down to the detective bureau and handed it in to Lieutenant Russin and, after I handed in the report, I went back to my post, which would be the east side of Binghamton, which incorporated Upper Court Street. I started checking motels, hotels, restaurants, and parking lots, mainly, and when I got to the Court Street Inn, which is just outside the City of Binghamton -- it's the old Holiday Inn East, Holiday Inn East -- I went into the lot; there was approximately only four to five cars in the lot. I checked the back lot, which would be the west side of the building, and I -- sitting by itself was a car; it was a bluish-green Chrysler with temporary Pennsylvania plates on it. I looked inside the car, through the windows; the car was locked. I left and I went to find the manager of the Court Street Inn, which I did, and I asked him if two

black males had registered in the last couple of hours, or today, and he stated, "Yes, one, not two," but one had registered. I asked him approximately what time. He gave me a time of two-thirty to two-forty-five, two-forty, right in there. I asked how the person was dressed. He said, "He was well-dressed, very polite." I says, "Is there a Pennsylvania temporary plate registered? I know you only have a few cars." He said he could check it, which he did. The only car he had with temporary plates on the car I believe was from Canada or from Maryland, one or the other, something like that, except it wasn't Pennsylvania.

Q. How about the car you had seen, was it registered at all?

A. I asked him then was there a Chrysler registered; there wasn't. I pointed out the window to the car I had spotted. I said, "Do you see a bluish-green Chrysler out there? Is that registered?" We went through the few registrations he had again. I believe there were only four in the whole motel. He said it wasn't registered. I said, "The one black male, what car did he register?" He pulled the card and said it was a Volkswagon. There was not one in the lot. A woman, who was the assistant manager, or a maid -- the way she was talking, she apparently worked there -- she said, "I think there is two males in that room," and the manager said, "Yeah, I think you're right." I thought that was

unusual because it was a single bed, and if anybody wanted to sneak in and sleep they would have to sleep on the floor; it was a very small room with only a single bed.

Q. Did they indicate they had actually seen two black males?

A. Yes, they did.

Q. And where was the room that the black male that registered, that had actually registered himself, in relation to the Chrysler that was parked?

A. The Chrysler was parked right in front of the room. So I called the detective division and informed Lieutenant Russin of the facts I had, and he dispatched the Street Cpatain -- it was Captain Francescone on patrol -- and a detective unit also responded.

Q. Once they responded, can you relate for the Court what happened?

A. I gave them the information that I had, and then Captain Francescone talked to the manager and confirmed the story I had just stated. So we went to the room, which was room one-oh-one (101); it's on the first floor; again, it's facing the west side of the building, in the back, and because we knew a shotgun was involved, we took defansive positions. Lieutenant (sic) Francescone knocked on the door and announced, "Police," and at that time I noticed the curtain opening and a man look out -- he was a black male --

look out. All I saw was his face, and the curtain shut, and I don't know if it was just a minute or not, but I know there was a suspension, there was a time lapse, which I thought was approximately two to three minutes.

Q. Where were you while this two to three minutes was going on?

A. I was behind the car that was parked in front of the place, which is approximately twenty feet from the front door, fifteen to twenty feet.

Q. So you were some fifteen to twenty feet from the front door of the room itself?

A. Yes, behind the car.

Q. What is the next thing that happened you were aware of?

A. Like I said, I thought it was two to three minutes. A black man came out, well-dressed, and shut he door behind him. He made the statement, "Oh, I thought you were the taxicab." That's when a detective -- I believe it was Grace; I'm not sure -- it was a plainclothes officer -- took him off to the side. We knocked on the door and received no response, and it was at this time that Captain Francescone talked to the manager again and returned with the key to room one-oh-one (101). We knocked again; there was no response. So I got up closer with Francescone; I was behind him. Lieutenant -- or, Captain Francescone unlocked the door, and pushed the door open. We did not enter. He pushed the

door open and sitting on a table right next to the T.V. was a red turtleneck sweater which, since the time of the initial response and since I went up to the Court Street Inn, that information had been relayed over the police radio of clothing of one of the individuals, a suitcoat and a red turtleneck sweater, and which a red turtleneck sweater was sitting next to the T.V.

Q. How about the height or physical characteristics of the two individuals, had that been radioed over the police network as well, do you recall?

A. I can't recall specifically, but I do remember they were well-dressed and a thin built or good built; that's all I can really remember.

Q. Once you saw the red turtlaneck, what was the next step or action that was taken?

A. The three of us standing in the doorway all saw the red turtleneck sweater. We didn't say anything to each other. Captain Francescone went to the bathroom; the other officer went to the back of the room; I went right under the bed, where there was a second individual laying under the bed. I told him to come out and to keep his hands where I could see them, because he was big. He was a big individual, and the bed was so small we had to lift the bed up to get him out. We lifted the bed up and he came out,

and where he was laying there was a big garbage bag, a black plastic garbage bag. I could see some bills laying on the floor, and pills.

Q These were under the bed?

A. These were under the bed. All we did was take the individual outside and reshut the door.

Q. And is that individual in the Court room here today?

A. Yes, he is.

Q. Did you have any further contact with the investigation from that point on?

A. I just took him to a patrol car, and that was the extent of my involvement.

Mr. Rose: Thank you; no further questions.

Cross-examination by Mr. Hillis:

Q. Officer Martin,---

The Court: Excuse me. Is he making an identification of this defendant as one of these individuals?

Witness: This is the individual that was under the bed.

The Court: Underneath the bed, the second one?

Witness: Yes.

The Court: All right. I'm sorry.

Q. Mr. Martin, you indicated that early--- Did you prepare any reports in connection with this incident?

A. Yes, I did.

Q. Police reports.

A. Yes, I did.

Mr. Rose: (Handed document to defense counsel.)

Mr. Hillis: Might I have just a moment to read it?

Q. You indicated that somewhat early in this investigation you went over to the vicinity of Crone's Drug Store, is that correct; you were over in the Conklin Avenue, The Arena area physically?

A. Yes.

Q. And you indicated that you knew at that particular time that two black males were involved in this particular incident, is that correct?

A. Not immediately.

Q. Well, after you got there.

A. Yes, sir.

Q. And at some time you were informed that someone had seen what they believed to be a green Ford with temporary Pennsylvania plates, is that correct?

A. Yes, sir.

Q. Who told you that?

A. That was put over the radio by Captain Francescone who, at the time, was our relief captain, and he was at headquarters

when he put that over the radio.

Q. Did this come from another police officer?

A. Yes.

Q. Did the person work in the south side car that would have been——

A. It was the officer that worked, yes, the southeast car, on the day trick, who had just finished work; he had just finished work.

Q. Was there any indication over the transmission as to when this vehicle had been seen, or anything like that?

A. No, an indication of when it was seen was not put over the air.

Q. So the transmission simply was that -- something to the effect that it was understood that there were black males involved in the robbery and someone working the southeast car some time during that day had seen a bluish or a greenish colored Ford with temporary Pennsylvania plates?

A. That's how it was put out, a possible suspect.

Q. You had no indication from any of the witnesses that in fact the car either was a Ford or did have temporary Pennsylvania plates, either one, is that correct?

A. No.

Q. This was the only knowledge you had?

A. Just what was put over the air.

Q. Let me ask you this. When you-- Were you instructed to patrol up and down Court Street, and like that, to look at the different motels, or was this on your own initiative?

A. After I turned in the initial report, which is the first page, I was told to check all my parking lots, hotels, and motels.

Q. And you went outside the city limits to do this?

A. Yes.

Q. That was not unusual under these type of circumstances?

A. That's not unusual under these circumstances, no.

Q. At that time you looked for -- you were looking for a big car, bigger than a Ford--

A. Yes, sir.

Q. --that had been seen coming out of the Crone Drug Store parking lot, is that correct?

A. That's right.

Q. And you had no indication from any of the witnesses that had seen this car come out in fact it did have temporary Pennsylvania plates on it?

A. No, not from the three witnesses I spoke to that gave me additional information.

Q. So you confirmed the information you had received over the broadcast as to the type of vehicle, is that correct?

A. Yes, to an extent.

Q. When you got up to the Court Street Inn and verified -- if I recall your testimony correctly -- that a single, black male had registered and had registered that his vehicle was a Volkswagon, is that correct?

A. I believe it was a Volkswagon. I know it wasn't registered as the car -- as the Chrysler.

Q. Did the people at the motel actually tell you they had seen two males go into this particular room, or did they just feel there might have been two?

A. No, the woman stated she had seen another black male enter the room. Now, the manager did -- I cannot honestly state if he saw the second one; the woman indicated that she had.

Q. All right. This is when you asked for some assistance, is that correct?

A. Right. I called in that information to the detective unit.

Q. When you-- At some point in time you indicated you went and took a look inside the vehicle which was parked out in the parking lot, this bluish-green, whatever it was?

A. Yes, I did.

Q. What did it end up being, what kind of car?

A. A Chrysler.

Q. A bluish-green Chrysler with Pennsylvania plates. Did you

see anything inside it when--- Did you look in?

A. Yes, I looked in.

Q. Did you see anything?

A. No.

Q. No contraband, or anything?

A. No.

Q. Did you try the doors on it?

A. I tried the one door; it was locked. I looked at the buttons on the other doors.

Q. They were all pushed down?

A. Yes.

Q. When the back-up units arrived, how many people were on the scene when the first person came out of the motel room?

A. When the first person came out of the motel?

Q. Yes, how many people?

A. I can only give you an estimate. I believe there was three uniformed and two plainclothes; it could vary by one.

Q. Did you verify from anyone or did anyone in your presence verify that the first person that came out was the one that had registered for the room; do you know if he was or wasn't?

A. I don't know personally. I know he was taken towards the lobby where the manager was and he observed everything, but I can't confirm it.

Q. You don't know whether this was determined to be the party that registered?

A. I can't confirm that, no.

Q. Was this person questioned at all in your presence; did he state the other person was inside?

A. The only statements I heard was when he knocked on the door and the captain said, "This is the police," and he said something in response, which I don't remember, and the time lapse -- two minutes, I say -- passed, when he come out he says, "Oh, I thought you were the taxi." That's all I heard.

Q. And he was immediately taken in custody?

A. A plainclothes officer escorted him towards the lobby.

Q. He didn't look like he could walk away if he wanted to, could he; you understood he was in custody at the time?

A. I understood he was in custody?

Q. Yes.

A. I knew he was wanted for questioning. I didn't know they were going to keep him, no, I didn't.

Q. No one questioned him in your presence?

A. No.

Q. Did anyone knock on the door again to ascertain whether there was other people or request if there was another

occupant in the room that they come out, or anything of that nature; do you recall doing that at all?

A. I believe Captain Francescone knocked again at the door.

Q. He knocked again at the door and received no response?

A. No, there was no response.

Q. At that point in time you went and got the manager and got a key?

A. I stayed where I was. Captain Francescone left and returned with the key.

Q. He did not return with the manager?

A. I can't remember if the manager was with him or not.

Q. He opened the door while all of you were standing there ready to surge into the room, is that what I understand?

A. We didn't surge in.

Q. It's my understanding you were using a certain amount of caution because you understood there was a weapon involved?

A. Yes.

Q. But you positioned yourself in a position where you could see what was going on in that room when you got the door opened?

A. Yes.

Q. And you could look right in?

A. When the door was opened, we could see the whole room.

Q. The only reason you could see in was because of the unlocking of the door by Captain Francescone with the key he got from the manager?

A. Yes.

Q. No one in your presence asked the individual who was brought out of the room if he would give permission to the police officers to undertake to look around?

A. I don't recall any other conversation.

Q. Let me ask you this. What else did you see in the room besides the turtleneck from the outside?

A. From outside, there was clothes scattered, which I couldn't tell you what it was. The red turtleneck is something I just saw and I reacted to that.

Q. That was the only description of clothing that really had a pronounced effect over the transmission?

A. Yeah.

Q. Did you notice any hypodermic needles scattered around there?

A. I didn't see any heroin or needles, no.

Q. Anywhere in the room.

A. I didn't see any.

Q. Did you see any vials of drugs, or anything like that?

A. When I lifted the bed, there was prescription bottles.

Q. Loose pills?

A. I didn't see any loose pills; I didn't make any note of loose pills; I noticed the bottles.

Q. Did you pick anything up?

A. Just the individual. I didn't take my eyes off him once.

Q. Did you see anyone else pick anything up?

A. Hmph (witness just making a sound through his lips).

Q. Did you pat him down right away to see if there was a weapon on him?

A. Yes, I did.

Q. You didn't find anything on him?

A. No.

Q. You didn't see a gun laying around?

A. I didn't see one.

Q. You didn't see one in the car when you looked in?

A. No.

Q. Was this the last contact you had? Did you advise him of his rights; did you ask him what he was doing?

A. I said nothing to him.

Q. Who took him in custody?

A. I placed him in the police car. I believe at that time Sergeant Corea had just arrived at the scene, and I believe he is the one I entrusted him to.

Q. Your basic contact was developing the description, the

potential description of the vehicle and spotting a car which partially matched one description and partially matched another one?

A. That was it.

Q. You had two separate and distinct descriptions from these individuals?

A. That's correct.

Q. It was half and half, the vehicle you saw?

A. It was a combination of the two.

Q. On paper, at least at the motel, it didn't belong to the particular individuals that registered?

A. That's right.

Mr. Ellis: Thank you very much.

Mr. Rose: Just a few, Your Honor.

Redirect examination by Mr. Rose:

Q. Officer, you were asked if you had two separate and distinct descriptions of the car which conflicted. In fact, what could Mrs. Reno -- what did Mrs. Reno tell you about the license plate that conflicted with---

A. She didn't see the license plate.

Q. She didn't see that. Did she tell you anything about the color of the car that conflicted with what had gone out over the radio as far as color is concerned?

A. I don't know if it's a conflict; there was a difference

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of opinion as to what color it was, bluish-green, or green; she said bluish-green.

Q. What color car did it turn out to be?

A. It was a bluish-green -- looked bluish-green. I don't know what the specific color is.

Q. Where did the term Chrysler or Pontiac come from in your description?

A. I asked her if it was a Ford; she immediately rsponded no. I don't know her exact words, but she said it was bigger, or better. I didn't know what she meant, bigger or better. I said, "What do you mean by that?" I said, "It was not a Ford, not a Chevy?" She said, "No, it was bigger, better than those cars." I said, "What do you mean by that?" She said, "A Chrysler." I said, "A Pontiac?" She said, "A Pontiac, a Chrysler." That was basically the conversation.

Q. Thank you. I do have one further question, if I may. Could you describe the demeanor, the manner of the defendant you took from underneath the bed while you had an opportunity to observe him; how would you describe his condition, his manner?

A. I thought he was kind of calm, personally.

Q. Calm?

A. Calmer than I was.

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Mr. Rose: Thank you.

Recross-examination by Mr. Hillis:

Q. Did the individual appear high to you at all?

A. No.

Q. Did you see any evidence of recent drug usage on him, look at his eyes, or anything like that?

A. No.

Q. How about his arms; you handcuffed him, I presume?

A. I think he had a white T-shirt on; I didn't look at his arms.

Q. You didn't check his arms for needle marks?

A. No, not at that time.

Q. Let me divert back, if I may, for a minute to the description of the vehicle. The lady told you it was bluish-green, or something like that?

A. Bluish-green.

Q. Her daughter said it was green, right?

A. They both talked at the same time, and what I got out of it was bluish-green. I asked again. The mother took over the conversation and said it was bluish-green.

Q. And the description you received over the radio was green?

A. Just green.

Mr. Hillis: Okay, thank you very much.

Mr. Rose: No further questions.

The Court: Thank you.

Mr. Rose: Thank you.

Your Honor, the People call Captain Pasquale Francescone.

PASQUALE FRANCESCONE, being first duly sworn on behalf of the People, testified as follows:

Direct examination by Mr. Rose:

Q. Captain Francescone, for the record, are you a captain with the Binghamton City Police Department?

A. Yes, sir, I am.

Q. How long have you been with the Binghamton City Police Department?

A. Nineteen years, sir.

Q. And were you on duty on the thirtith of September of last year, a Friday?

A. Yes, sir, I was.

Q. Do you recall being involved in an investigation of a robbery that took place on the afternoon of that day involving Crone's Drug Store on Conklin Avenue?

A. Yes, sir, I do.

Q. Did you have occasion to go to the Court Street Inn located on Upper Court Street which is outside the city limits of Binghamton?

A. Yes, sir, I did.

Q. Do you recall about what time of the day that was?

A. Yes, it was about five in the afternoon, sir.

Q. When you got there, could you describe for the Court what took place?

A. Yes, sir. When I arrived there, I spoke to Officer Martin. He told me he had spotted a verhicle that was possibly involved in the armed robbery that took place at Crone's Drug Store. He told me he had talked to the innkeeper, and that there was a black male that did sign into the room. After giving me all the information, I spoke with the innkeeper. After talking with the innkeeper, I told Martin we will have to knock at the door and go in.

Q. You told him you would do what?

A. We would go into the room in which he was.

Q. Could you describe your approach to the room and what you did as you got there?

A. Yes, sir. I walked up to the room door and knocked on the door. I was right at the door itself, and I knocked on the door, and a voice inside said, "Who is it?"
I said, "Police." He said, "Wait a minute."

Q. The voice said that?

A. Yes, sir. I did, and while I waited, I heard two men talking -- another voice inside.

Q. Could you hear what they said?

A. No, sir.

Q. Are you -- Is there any question in your mind as to whether or not there was in fact two voices?

A. Yes, there were two different voices. And, then, maybe about half or three-quarters, or two minutes -- maybe one or two minutes, someone peered out the window, looked at me and said, "Just a minute." I said, "Okay."

Q. Were you the closest one to the door?

A. Yes. I was already at the door, sir. And then I waited -- it seemed like two or three more minutes -- and, finally, a person appeared at the door. He said, "What do you want?" I said, "I want to talk to you." He came out the door and closed the door behind him.

Q. He came out onto what?

A. Out of the door, out to the -- I guess by the walkway right in front, and I asked him his name and -- I didn't ask him his name. I asked him where he was going, and he said he was going to Binghamton to see Jimmy Love.

Q. How did you happen to ask him where he was going?

A. He started to walk away; he went over to the side. He said, "Are you the taxi?" I said, "No. I want to talk to you." He went away from the door. I said, "Who is in there?" He said, "No one." As we got to the side I think that is when he brought up in the conversation he was going to see Jimmy Love, he was waiting for a taxi to see Jimmy

Love in Binghamton. I looked him over good. To me, he answered the description of one of the persons wanted in the holdup

Q. How did he do that?

A. By physical stature, height, size.

Q. Could you tell us how you feel the defendant matched that description you heard of one of the two robbers you thought this was?

A. The physical description, actually. He answered the physical description given out over the air of one of the people involved in the armed robbery.

Q. Could you match up the factors that went through your mind at the time?

A. Height; weight, approximate weight; looks neat, he was neat. I instructed two officers to take him down to headquarters, he did match the description of one of the two people involved in the robbery and to take him to headquarters. At that time I asked the innkeeper if it was all right if I checked the room, I felt there was someone else in there, if it was all right to check the room, I would like a key to it. He said, "Okay," and went and got a key and gave it to me. I went to the door, unlocked it, and pushed it open. I didn't see anyone in there. I walked in, and as I walked in, on the dresser on the left I noticed a turtleneck sweater, a rust color turtleneck sweater,

and a black, shiny shirt; those two articles were also mentioned in the report as being worn by the suspects involved in the robbery earlier in the day. And I pointed them out to Officer Martin, or Connors, which ever one was right behind me. I said, "I'll check the bathroom, you check under the bed." I went to the bathroom. The next sound I heard was, "Come on out from under there," and I turned and seen someone had lifted the bed and there was another fellow under the bed.

Q. And is that individual in the Court room here today?

A. Yes, sir, he is.

Q. And what occurred next; did you see anything else in the room?

A. Yes. After I looked, this individual stood up and we started to handcuff him. I looked at him and asked him if he was Jimmy Love. He said, "No, I'm not." He answered the description of the second suspect. I said, "Take him." There was a package on the floor under the bed in a — there was a plastic bag containing some articles. I told the officers, "Everybody out of here and pull the door closed behind you," and I went to the office and called the lieutenant of detectives, which was Lieutenant Russin, and asked him to get the District Attorney's office, that I

wanted a search warrant to search the room and the car.

Q. Had the door locked when you pulled it?

A. Yes, sir, I locked it.

Mr. Rose: No further questions.

Cross-examination by Mr. Hillis:

Q. Captain Francescone, with regard to the individual you found under the bed, you had occasion to observe him briefly, at least while he was in custody, is that correct?

A. Yes, sir.

Q. Did you notice anything unusual about his physical characteristics, his eyes, his mannerisms, anything of that nature?

A. No, sir, I didn't.

Q. Did he appear to be high to you at all?

A. I couldn't say he was high, sir.

Q. You couldn't say he wasn't, either, I guess?

A. No, I couldn't.

Q. Did you have an opportunity to look at his arms, or anything of that nature?

A. No, sir, I didn't take that opportunity.

Q. How long were you in his presence that afternoon?

A. It was really a short time, sir, maybe a minute and a half, two minutes, very brief. We stood him up, turned him around and handcuffed him.

Q. Did you direct any questions at him other than, "Are you Jimmy Love?"

A. No, sir, I didn't.

Q. You didn't tell him you felt he was a suspect in a robbery, or anything of that nature?

A. No, not to him directly, no, I didn't.

Q. Let me ask you this. You mentioned that the first individual that came out answered -- somewhat matched the description; what did that first individual that came out look like?

A. I would say about five foot ten, sir, a hundred seventy-five pounds.

Q. Would you say he was a stocky individual?

A. He was what, sir?

Q. Stocky.

A. No, he had a nice built on him.

Q. An average build, thin?

A. Not thin, good built.

Q. So, a hundred seventy-five pounds on a five, eleven frame filled up his frame?

A. I would say he was good size.

Q. Did he have any particular clothes on that matched any description you had?

A. No, he didn't, not at that time.

Q. So it was just basically his build?

A. Yes, sir.

Q. Did you observe this particular vehicle, the bluish-green, whatever it was, before entering the room?

A. Yes, I did, sir.

Q. Did you look into the vehicle?

A. Did I look into the vehicle?

Q. Yes.

A. No, I didn't, sir.

Q. Did you try the doors to see if it was locked?

A. No, I didn't.

Q. After you took the first individual into custody -- He came out, as I understand it, and said he was going to Binghamto to see Jimmy Love?

A. That's right, sir.

Q. He was immediately placed under arrest, is that correct, taken into custody for questioning?

A. Yes; yes, he was.

Q. Was he removed from the area?

A. Yes, he was.

Q. You obtained no information from him whatsoever?

A. No, I didn't, sir.

Q. Then you went and got the key to the-- Did you ascertain from the innkeeper if this was the individual who registere

for the room?

A. Yes, we did.

Q. What did the innkeeper say?

A. He said, "Yes."

Q. Then you got the key from the innkeeper?

A. Yes, sir, I did.

Q. You went back and unlocked the door and physically entered the premises?

A. Yes, I did.

Q. Before you saw anything, is that correct?

A. That's right, sir.

Q. So you were through the door and inside?

A. Yes, sir.

Q. You didn't take any steps to obtain a warrant up to that point in time?

A. No, I didn't, sir.

Q. You did not in fact obtain a warrant until after you had placed Mr. Waiters under arrest, taken him into physical custody and seen other physical evidence inside?

A. That's right; we did not get a warrant until after that was all done.

Q. Did you pick any items up?

A. No, sir.

Q. Did you search Mr. Waiters, yourself, personally?

A. No, I did not.

Q. Did you see any heroin needles or anything of that nature scattered around the room?

A. After, I did, after we had taken him out.

Q. While you were still inside the room?

A. This was in the bathroom.

Q. This was prior to getting a warrant?

A. Yes, sir.

Q. What did you see?

A. There was water in the bathtub.

Q. In the tub?

A. Yes.

Q. Did it look like someone was going to take a bath?

A. It was quite a bit of water. I don't know how much you would use for someone to take a bath. Well, there was quite a bit of water in the tub; it wasn't like a leak in the bath.

Q. What else did you see?

A. That, and I saw a plastic bag, clothes on the dresser.

Q. What was in the plastic bag?

A. I don't know, sir.

Q. You did not look inside the bag?

A. No, sir, I didn't.

Q. You saw drugs, is that correct?

A. No. I think I saw a needle in the bathroom.

Q. Only one needle, in the whole room?

A. I think so.

Q. Was this after Mr. Waiters had been removed from the room?

A. Yes, because I -- as I went into the bathroom, I heard the other fellow say, "Come out from under there;" that distracted me from the bathroom. I didn't see anybody in there, so it distracted my attention back out to the other room.

Q. So you went back and looked afterwards?

A. I may have gone in the bathroom after, yes, and looked at it again.

Mr. Hillis: Thank you very much.

Witness: Yes, sir.

Redirect examination by Mr. Rose:

Q. Is it possible you did not go back a second time and look in the bathroom?

A. To the bathroom?

Q. Yes.

A. Very possible, very possible.

Q. At any rate, you did look into the bathroom just before or at the time you heard the other officer say someone was under the bed?

A. Yes, because I was looking for the second person, and

I didn't see him in the bathroom.

Q. After the person who was under the bed was taken into custody, could you describe what happened at that point as best as you can recall; how soon did you get everybody out?

A. Just a matter of minutes; it was very shortly.

Q. Was there any rummaging around, or looking?

A. No, there wasn't

Q. No further questions.

A. I closed the door personally, myself, and placed an officer there to watch the bathroom -- rather, the room, and the car on the outside.

Mr. Rose: Thank you.

The Court: Thank you.

Mr. Hillis: One question.

Recross-examintion by Mr. Hillis:

Q. Let me ask you this, Mr. Scott. The other defendant that was booked in at the Binghamton Police Department -- Do you take heights and weights of people when you book them in?

A. The next day we do, or whenever we fingerprint them; I believe they do, yes, sir.

Q. Okay, so that information will be available?

A. Yes, it is.

Mr. Hillis: Okay, thank you very much.

Witness: That's it? Thank you.

Mr. Rose: Your Honor, the People call Patrolman William Grace.

WILLIAM GRACE, being first duly sworn on behalf of the People, testified as follows:

Direct examination by Mr. Rose:

Q. Officer, for the record, you're employed by the Binghamton City Police Department?

A. Yes, sir, I am.

Q. How long has that been going on?

A. Eight years, sir.

Q. Were you on duty the thirtieth day of September, a Friday, of last year?

A. Yes, sir, I was.

Q. Did you have occasion to be a part of an investigation into a robbery that occurred that afternoon at the Crone's Drugs on Conklin Avenue?

A. Yes, sir, two eighty-six (286) Conklin.

Q. As part of that investigation, did you have occasion to assist in the execution of a search warrant?

A. Yes, sir, I did.

Q. Then-- Did you also assist at all in the application for the search warrant?

A. No, sir, I did not apply for it.

Q. Who executed the search warrant with you?

A. It would be Lieutenant Russin, Sergeants Morrison, Eggleston, Miller -- and I believe that's it.

Q. And who was it that made the inventory under the search warrant and presented it back to the issuing Judge?

A. I did, to Justice Merritt out in Kirkwood.

Q. You did the---

A. The return, yes, sir.

Q. I show you People's Exhibit marked Number One for identification and ask you if you can identify that as the search warrant.

A. Yes, sir, that's it.

Q. And do you also identify the application as a part of that People's Exhibit marked Number One?

A. By Sergeant Morrison, right.

Q. Did you do the inventory on the search warrant on the day you performed the execution of it?

A. Yes, sir, I did.

Q. When was that?

A. We went out there, it was in the evening, after dark; I think it was somewhere around seven o'clock at night, somewhere around there.

Q. I show you Exhibit Two marked for identification and ask if you can identify that.

A. This is the return I made on the car and on the premises

to Justice Merritt.

Q. And is that your signature at the bottom of each page on the inventory?

A. Yes, sir, it is.

Q. And do you recognize the signature on the application itself as being the one that was on the search warrant you executed on that date?

A. Right, by Sergeant Morrison.

Mr. Rose: I will offer them into evidence at this point, Your Honor. I think defense counsel has seen everything except the inventory itself.

Cross-examination by Mr. Hillis:

Q. Officer Grace, you don't know anything about -- Let me withdraw that. Were you present when any of these individuals were initially taken into custody at the Court Street Inn?

A. When Charles Scott was, sir.

Q. When he was taken into custody?

A. Yes, sir. I brought him down to the police station.

Q. Shortly thereafter, or on the way, did you hear a transmission that the other gentleman had been taken into custody?

A. I believe so, yes, sir.

Q. That was on the way--

A. Into the station.

Q. Was that before you questioned Mr. Scott?

A. I didn't do the questioning on him.

Q. Pardon me?

A. Sergeant Metara questioned him.

Q. After you got him back--

A. To police headquarters.

Q. --to police headquarters? You don't know anything about the actual application for the search warrant itself; you weren't present?

A. I didn't handle that.

Q. You don't know on what information it was based?

A. Not totally, no, sir.

Q. You don't know the police officer---

A. I believe there was other officers that were out there.

Q. You believe it was Sergeant Morrison?

A. No, he made the application.

Q. Based on information that was given to him by other police officers?

A. I believe so, yes, sir.

Q. Based on what they observed in the room when they were in the room in---

A. You would have to ask Sergeant Morrison.

Mr. Hillis: Thank you very much. No further questions.

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The Court: Do you have any objection to the receipt of People's Exhibits One and Two in evidence?

Mr. Gillis: Not for the purposes of this hearing, Your Honor.

The Court: All right, People's Exhibits One and Two are received.

Mr. Rose: No further questions, Your Honor.

Your Honor, the People call as their next witness Detective Sergeant Andrew Corea.

ANDREW COREA, being first duly sworn on behalf of the People, testified as follows:

Direct examination by Mr. Rose:

Q. Sergeant Corea, for the record, are you a detective sergeant with the Binghamton City Police Department?

A. Yes.

Q. And how long have you been employed by the Binghamton City Police Department?

A. Ten years.

Q. And were you on duty on the thirtieth of September of last year, a Friday afternoon?

A. Yes.

Q. Did you have occasion to become involved in the investigation of a robbery at Crone's Drug Store located on Conklin Avenue in the City of Binghamton?

A. Yes.

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Q. As a part of that involvement, did you have occasion to take into custody the defendant, Leon Waiters, also known as Leon Gayle?

A. Yes.

Q. And could you tell the Court how that took place, how you happened to take him into custody?

A. Yes. I was sent to the Court Inn on Upper Court Street. When I got there, Mr. Waiters was handcuffed, and I transported him to the detective division.

Q. Once you got him to the detective division, did you have any conversations with him?

A. Yes.

Q. Did you have any conversation with him on the way to the detective division?

A. Nothing concerning the investigation we were working, just casual conversation, where he was from, what his name was.

Q. Let me show you People's Exhibit marked Number Three for identification and ask you if you recognize that.

A. Yes, it's a Miranda warning form.

Q. And is that the Miranda warning form you use in this instance?

A. Yes.

Q. How did you use it?

A. I completed it, read him the ten questions, copied down his answers, signed it myself, and had him sign it after he read it.

Q. Did he do that?

A. Yes.

Q. Are those answers the exact responses he gave you?

A. Yes.

Q. And once you read him the contents of that Miranda warning form and he signed it, did you say you signed it also?

A. Yes.

Q. I missed your saying that. Did you then, at that point -- What did you do? I'll withdraw the question and ask it that way. What did you do?

A. I talked with him about the investigation we were working and eventually reduced what he told me to writing.

Q. I show you the defendant's -- Exhibit Four for identification and ask you if that is the statement you reduced to writing.

A. Yes, this is the statement.

Q. Did he sign that statement?

A. Yes.

Q. Did you sign it as well?

A. Yes.

Mr. Rose: I will offer them into-- You have copies of both of these, don't you?

Mr. Hillis: Yes.

Mr. Rose: Your Honor, I will offer these into evidence at this point.

Mr. Hillis: Would the Court reserve on that until I get a chance to cross-examine?

Mr. Rose: I have no further questions.

Cross-examination by Mr. Hillis:

Q. Sergeant Corea, what was the disposition of the defendant at the time you questioned him? Did you notice anything unusual about him at all?

A. No.

Q. Were you aware a quantity of drugs had been taken from Crone's Drug Store?

A. Yes.

Q. Did you make any effort to check and ascertain as to whether there had been any recent drug usage by the defendant prior to questioning?

A. Yes, I talked to him about it.

Q. What did he indicate to you?

A. He had been shooting heroin that day, and he says after the drug store -- I believe he said he shot some Darvon or Darvonet.

Q. Did he tell you how many times?

A. I think numerous times of heroin on the way up, maybe

three or four, something like that.

Q. What about Darvon?

A. I don't know; I think once.

Q. Okay. Now, is everything he told you essentially contained in that statement?

A. Yes.

Q. Is there anything he might have told you that isn't contained in it?

A. Not that I can recall right now.

Q. Is it your opinion that the defendant at the time was in any way intoxicated on drugs, under the influence of drugs, high, whatever you want to call it?

A. He appeared normal to me.

Q. Were his answers coherent?

A. Yes, and he was alert.

Q. Was any -- Was it suggested to him at all that things might go better for him if he made a clean breast of it?

A. I told him it would be better to tell the truth.

Q. Was he promised anything for telling the truth?

A. No, he was not promised anything.

Q. All right. Now, in the statement it's indicated that Mr. Walters got out of the vehicle and went into Crone's Drug Store to buy a pack of cigarettes, then Larry came in behind him. Did he in fact indicate to you when you were

questioning him it was his intention to go in and look at the place and go back out and say it wasn't any good?

A. He said he was going to go in and look it over, and he went in, and Scott followed him right in.

Q. Didn't he indicate it was his intention to tell Scott it was no good, he really didn't want to rob any place at all that day?

A. I don't remember that.

Q. You don't remember him saying anything like that?

A. No.

Q. Did he ever indicate to you he had seen the weapon before Scott drew it out back in Crone's Drug Store?

A. Previously that day?

Q. Uh-hmm (affirmative).

A. No.

Q. Did he indicate to you he had never seen it?

A. The way I understood it, when the weapon come out he was as surprised as anyone else.

Q. He didn't know Scott was armed when he came into the store?

A. I know there was a mention of a Johnson earlier. Can I refer to that (indicating exhibit)?

Q. Surely.

A. Okay. He had already asked Larry, "How are you going to do it," and he said he had a Johnson, a gun.

Q. A Johnson is a gun?

A. He refers to a gun as a Johnson.

Q. Okay. So it appeared to you from what he told you that he was quite stunned by the presence of a shotgun?

A. There was mention of a gun, but he said he was stunned when he saw it.

Q. Okay. Did he indicate to you whether he knew the weapon was loaded during the course of the robbery?

A. No.

Q. Did he indicate he knew it was loaded, he did not know it was loaded, or there was no mention of it?

A. There was no mention of it.

Mr. Millis: Thank you very much.

Mr. Rose: No further questions.

The Court: Thank you.

We'll just take a couple of minutes.

Mr. Rose: Were the statement and the Miranda received into evidence?

The Court: No, he asked me to reserve until after cross-examination. I am, at this point, unless there is an objection, going to receive People's Exhibits Three and Four in evidence for the purposes of this hearing.

Mr. Millis: Thank you, Your Honor.

The Court: Let's take a couple of minutes.

(Proceedings were recessed at 4:19 P.M. and reconvened at 4:30 P.M.)

Mr. Millis: Your Honor, at this point in time I would move to suppress all of the physical evidence, as well as the statement of the defendant.

It's my impression, from listening to the evidence, that the initial entry into the motel room by Sergeant Francescone -- or, by Captain Francescone by obtaining the key to that particular room was illegal and that, in and of itself, was probably the motivating factor for obtaining the warrant, what was seen at that point in time there, through the entry; therefore, it would be my opinion that the warrant as well should fall.

And with regard to the statement of the defendant, of course, I -- it has been developed in the record that he was given his Miranda warnings subsequent to his arrest, but it would be my feeling that, based on the actions that has been brought forth which indicate the seizure of the defendant initially was illegal, and based on People versus Martinez, People versus Stewart, Brown versus Illinois, a recent string of cases, which indicate the giving of Miranda warnings does not per se attenuate the initial illegality, there has to be more given in the short period of time between the seizure of the defendant and the taking of a statement. They feel the statement should be deemed

so closely connected it would not be considered fruit of the poisonous tree.

That, basically, is my motion.

Mr. Rose: The basis of the defense's motion rises or falls not only on whether or not Captain Francescone had probable cause at the time he arrested or took custody of the defendant Scott but, also, upon entry into the room. I think all the facts developed in this hearing indicate he did have probable cause, based upon many different factors that had come to the attention of the police department as the result of its investigation of this robbery.

The Court: All right, the Court takes the position that the apprehension of both defendants was based upon reasonable and probable cause in view of the description of the defendants, the description of the car, and all the attendant circumstances, the fact that this was an apprehension very soon after the alleged robbery, and that, on the basis of all of the testimony I have heard this afternoon and all that has been presented here, at least, I am going to deny the motion to suppress — the physical evidence I am talking about now.

Mr. Millis: For the record I would point out it is my understanding that Mr. Scott is five foot seven, a hundred forty pounds, contrary to what Captain Francescone testified to.

All right. Now, secondly, insofar as People's Exhibits Three and Four are concerned, particularly Exhibit Four, which is the alleged statement of the defendant, the defendant Leon Gayle, also known as Leon Waiters, the Court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact.

One, a written statement alleged to be a confession was taken from the defendant Leon Waiters, who is also known as Leon Gayle, at Binghamton Police Department Headquarters on September thirtieth, nineteen seventy-seven.

Two, the statement of the defendant was made voluntarily, and not under the influence of fear produced by threats or coercion, or force by any members of the Police Department.

Three, the defendant did not request an attorney during the questioning or at any time before the alleged written confession was signed by him.

Four, the defendant was advised of his constitutional rights in accordance with the mandates of People -- or, of the United States Supreme Court in its decision in Miranda versus Arizona.

Five, the defendant voluntarily, intelligently and knowingly waived his rights at the time he made the alleged written confession. More specifically, he waived

his right to have an attorney present.

Conclusions of Law.

One, I find beyond a reasonable doubt that the alleged written confession of the defendant was made voluntarily, and he was not under the influence of fear produced by threats, coercion, or force.

Two, the constitutional rights of the defendant were not violated by the interrogating officer, or any other police officer at any time from the commencement of the questioning to the termination thereof.

Three, I find beyond a reasonable doubt that the requirements of the United States Supreme Court set forth in the case of Miranda versis Arizona were complied with.

Four, I find beyond a reasonable doubt that the warnings required under the Miranda decision were given, and in such a manner that the defendant was made unmistakably aware of his right not to speak and of his right to the assistance of counsel before speaking.

Five, I find beyond a reasonable doubt that the defendant understood his rights as a result of such warnings, and he voluntarily, intelligently, and knowingly waived his rights and made both the oral admissions upon which the statement was based and the written confession itself.

Okay; thank you.

Mr. Hillis: Thank you, Your Honor.

Mr. Rose: Thank you.

Mr. Hillis: If I might be heard on the record in regard to one more matter, Your Honor?

The Court: Surely.

Mr. Hillis: It's my understanding from Mr. Schanz of Mr. Rappaport's office that should this matter be tried next week as anticipated that the co-defendant, Mr. Scott, has indicated an intention to take the stand and testify in his own behalf. Mr. Schanz apparently is going to attempt to verify this, but it would be the position of my office that should this take place or should be anticipated, it would be inherently prejudicial to our client. Under those circumstances, we would request that the Court grant a severance.

The Court: Yes. You are opposed to such a severance, or am I mistaken?

Mr. Rose: That's right, Your Honor; you are correct, reason number one being that Mr. Scott expressed that desire some time back in December. We still don't know, at this point, if he intends to take the stand as of this time, and we do not feel the position of the two defendants is antagonistic, and I believe that any incrimination of this defendant by the co-defendant can be resolved through instruction by the Court to the jury at the time.

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The Court: I'm going to reserve on the motion at this point.

Mr. Hillis: Thank you.

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Supreme Court, U.S.
FILED
JAN 18 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-5438

LEON GAYLE,
a/k/a LEON WAITERS,

Petitioner,

-vs-

THE PEOPLE OF THE STATE
OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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COUNTER STATEMENT OF FACTS

On September 30, 1977, between 2:00 P. M. and 2:30 P. M., two black males entered the Crone's Drugstore located at 286 Conklin Avenue in Binghamton, New York. One of the black males was tall, approximately 6' 3", and was dressed in a maroon turtleneck. The other was shorter, approximately 5' 7", and was wearing a dark jacket.

Both men came up to the counter where the clerk, Natalia DeJohn was located. The taller of the two asked for two packs of cigarettes. The shorter man asked where the adhesive tape was kept. He went to the aisle and got a roll of tape. At that point, the shorter man asked the other man if this tape would do. The taller man responded that "this will be fine." The shorter man then bent down and came up with a sawed-off shotgun.

Both men came behind the counter and taped the hands of the clerk, the pharmacist, and Sally Cole, who was also behind the counter at the time. Shortly thereafter a customer, Jeffrey O'Hearn, entered the drugstore. He, too, was taken behind the counter and bound. The two men proceeded to take the money and some of the drugs from the store. When the two men left, the three people inside the drugstore waited several minutes then called the police.

Patrolman Martin was one of the first policemen to arrive at the scene of the robbery. Upon arriving, he was advised through a radio dispatcher to begin searching for two black males, possibly in a green Ford with temporary Pennsylvania license plates.

During his search he was informed that Mrs. Betty Reno might have seen the car used in the robbery. Mrs. Reno was then interviewed at her home. She described a car which had come out of the Crone's Drugstore parking lot at the time of the robbery and forced her to stop abruptly as a blue/green car. She thought it was either a Pontiac or a Chrylser. There were two black males in the car.

After interviewing Mrs. Reno, Officer Martin began to check various motels, hotels, and restaurants. While doing so, he found a blue/green Chrysler with temporary Pennsylvania license plates in the parking lot behind The Court Street Inn. Officer Martin went to the office and spoke to Mr. Carl, the motel manager. Mr. Carl told Officer Martin that a black man had registered earlier that day for a single room, room 101. Mr. Carl told Officer Martin that one of the men was very tall and the other was short. Officer Martin then inquired about the blue/green Chrylser that was parked outside of Room 101.

The vehicle did not appear on the motel register. Officer Martin then called this information in to the detective division.

In response to the call, Captain Francescone and a detective unit were dispatched. The Captain arrived at the motel at approximately 5:00 P. M. Once he arrived, he spoke with both Officer Martin and the manager. Captain Francescone then went to room 101 and knocked on the door. A voice from within asked "who is it?" Captain Francescone responded that it was the police. The Captain then heard two men talking inside the room.

Shortly, a black man stepped outside of the room. The Captain asked him who else was in the room and he said "no one." The man fit the description of the shorter man involved in the robbery and was taken into custody.

The manager told the Captain that the man was the one who had registered the room. The Captain obtained the pass-key, went to room 101, and knocked. When the person inside did not respond, the Captain opened the door. When the door was opened both the Captain and Patrolman Martin observed a red turtleneck sweater and a black shirt. Both of these articles of clothing had been mentioned as being worn by the men who robbed the drugstore.

The defendant was found hiding under the bed. The defendant fit the description of the taller man involved in the robbery and was also placed under arrest.

The defendant was taken to police headquarters by Sergeant Corea. The defendant was advised as to his Miranda rights and then was questioned by Sergeant Corea. The defendant made an oral statement as to his involvement in the robbery and this was subsequently reduced to a written statement.

Following the arrest of the two men at the motel. room 101 was secured by the police. Subsequently, a search warrant was obtained for both the room and the Chrylser. When the warrant was executed a loaded sawed-oft shotgun was found in the car. Inside the room the police found a quantity of cash and an amount of drugs. Also recovered was several bills which had "keepsake" identirication belonging to the victims of the robbery.

REASONS FOR DENYING THE WRIT

There are basically two separate reasons why the Writ of Certiore should not be granted:

A. The question: When there is probable cause to believe that a person has committed a violent felony, such as armed robbery, does the Fourth Amendment prohibit a police officer from arresting that person in a dwelling without a warrant and without exigent circumstances, is currently before the Supreme Court of the United States in the case of Theodore Payton v. New York, Index No. 78-5420, and Obie Riddick v. New York, Index No. 78-5421. This case has been heard by the Supreme Court of the United States and a decision holding that such an arrest may be made would make this writ moot.

B. It is respectfully submitted that there were exigent circumstances in the instant case which made it imperative that the police enter the motel room to effect the arrest ot the derendant.

In the present case, the police had probable cause to arrest the defendant prior to their entering the motel room. Due to the rapidly unfolding facts that confronted the police officers, it was reasonable for them to believe that any delay in arresting the defendant could result in injury to both themselves and to others and to the destruction of evidence which was located inside the motel room.

The police were investigating an armed robbery in which a sawed-off shotgun had been displayed. The vehicle which was believed to have been used in the robbery was located at a nearby motel. It was learned that motel employees had observed two men matching the description of the robbers were observed entering the motel room near the parked car shortly after the robbery. The police had knocked on the door, identified themselves, and heard two men inside.

It was at this point that the first man emerged from the motel room. This man matched the description of one of the robbers but did not have the sawed-off shotgun with him. Due to the gravity of the crime and the probability that the person who remained inside had the shotgun with him, the police were justified in entering the motel room and arresting the defendant who would not come to the door in order to protect both themselves and any other person who may pass by.

Secondly, time was of the essence to effect the arrest of the defendant in order to prevent the destruction of any evidence inside the motel room. This was not a situation where the police could have obtained a warrant prior to going to the motel. It was not until the police observed the one man who came out, that they determined that he did match one of the robbers description, which provided a portion

of the probable cause. Similarly this was not a situation in which the police could have posted a guard outside the motel room until a search warrant or arrest warrant could be obtained.

It should be noted that in this case the police had already identified themselves to and had been observed by the people inside the motel room. Had the police waited outside the motel room the defendant, who remained inside and would not come to the door, would have had an opportunity to destroy any of the evidence which was in the motel room with him.

For both of these reasons it is submitted that the exigencies of the moment would not tolerate the delay incident to obtaining a warrant and the warrantless entry into the motel room to effect the arrest was reasonable. Worden v. Hayden, 387 U.S. 294,875 S. Ct. 1642 18 L Ed. 782, Ker v. California, 374 U.S. 23. 83 S Ct. 1623, 10 L Ed. 2d 726, Johnson v. U. S.. 333 U.S. 10. 68 S. Ct. 367, 92 L. Ed. 436.

CONCLUSION

For all of the reasons stated above, it is respectfully submitted that the writ should be denied.

DATED: January 4. 1980
Binghamton, NY

Respectfully submitted,

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